

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL SUIT NO E019 OF 2024

ELIZABETH MWASI MAKOKO (suing as wife & personal representative of the Estate of Emmanuel Robert Mbinda (deceased))..... PLAINTIFF

VERSUS

ICEA LION GENERAL INSURANCE COMPANY LIMITED..... DEFENDANT

RULING

1. **Elizabeth Mwasi Makoko** (hereafter the Plaintiff) filed the instant declaratory suit against **ICEA Lion General Insurance Company Limited** (hereafter the Defendant) in respect of costs and interest arising from the judgement delivered in her favour on 5.07.2022 in **HCCC No.46 of 2018** (hereafter the primary suit), and against the Defendant's insured **Fuga Feeds Kenya Limited**.
2. Subsequently, the Plaintiff filed a notice of motion dated 13th May, 2025 and expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act (CPA), Order 2 rule 15, Order 51 Rule 1 of the Civil

Procedure Rules (CPR) seeking inter alia that the Defendant's defence be struck out and judgement on admission be entered in favour of the Plaintiff as against the Defendant.

3. The motion is premised on the grounds on its face and supported by the Plaintiff's affidavit to the effect that the primary suit arose from a road traffic accident involving a motor vehicle insured by the Defendant, and that she was awarded Kes. 36,615,010/= as damages together with taxed costs of Kshs.1,354,945, both attracting interest from the date of judgment.
4. She further averred that the Defendant acknowledged the judgment and made a partial payment of Kshs. 3,000,000/- in accordance with the statutory limit under the Insurance (Motor Vehicle Third Party Risks) Act (hereafter the Act). However, the Defendant had neglected its obligation under Section 10 of the Act to pay the taxed costs and interest accrued on the principal sum prior to settlement. Necessitating the institution of the present declaratory suit to compel the Defendant to fully indemnify its insured by settling the outstanding costs and interest, which she asserts do not fall within the statutory limit.
5. The deponent describing the defence dated 17th February 2025, as a sham contended that while effectively admitting the claim, the said

defence improperly asserts that the insurer's liability is capped at Kshs. 3,000,000/= inclusive of costs and interest. She asserted that costs and interest are payable separately and do not fall within the statutory limit, and that costs follow the event pursuant to Section 27 of the Civil Procedure Act.

6. In her view, the defence is intended to prejudice, embarrass, and delay the fair trial of the matter, and therefore urged the Court to strike it out and enter judgment in her favour as prayed in her plaint, including an order compelling payment of the taxed costs with interest from the date of judgment until full settlement.
7. The Defendant opposed the motion through the replying affidavit sworn on 1st April, 2025 by **Roselyne Kihara**, described as an Assistant Legal Manager with the Defendant. The Defendant's position is that contrary to the Plaintiff's assertions, its statement of defence does not contain any admission of the Plaintiff's claim while clearly and unambiguously responding to the Plaintiff's allegations. Contending further that the Defendant, as an insurer, is not under any statutory obligation to settle any decretal sum beyond the statutory limit of Kshs. 3,000,000/-, which obligation the Defendant had fully complied with by paying Kes.

3,000,000/- to the Plaintiff's advocates, as evidenced by the RTGS/Swift transfer exhibited in the affidavit as annexure **1 (at pages 3–4)** .

8. The deponent therefore denied any liability beyond that amount and rejected the Plaintiff's contention of an admission or that additional sums are payable. Further, by way of legal disputation unsuited to an affidavit, the deponent cited the Court of Appeal decision in **Kirikuu v Kenya Orient Insurance Company Limited (Civil Appeal E189 of 2022) [2024] KECA 8 (KLR)**, to assert that the question of the limit of an insurer's liability under the Act has been settled and that the Plaintiff's position is legally untenable.

9. On that basis, the deponent contended that both the suit and the motion are misconceived and an abuse of the process of the court. Therefore urging the court to dismiss the motion with costs.

10. The motion was canvassed by way of written submissions. The Plaintiff's submissions dated 30th September, 2025 are premised on the position that the Defendant, as an insurer, is statutorily obligated in addition to settling the principal decretal sum to the limit of Kes. 3,000,000/-, to pay the attendant costs and interest arising from judgment in the primary suit. The Plaintiff reiterating that following judgment in the primary suit, the Defendant paid Kes. 3,000,000/- but

declined to settle the taxed costs amounting to Kes. 1,354,945/- and accrued interest on the principal sum which was paid after a lapse of 65 days, as well as on taxed costs. It was contended that the defence amounts to an admission coupled with untenable averments of limitation of liability.

11. The Plaintiff identified the sole issue for determination to be whether the insurer is liable for costs and interest in addition to the statutory limit under Sections 5 and 10 of the Act. While acknowledging that Section 5(b)(iv) caps liability for the principal sum at Kes. 3,000,000/-, the Plaintiff argued that this provision relates strictly to the substantive liability arising from the accident and does not extend to costs and interest. In support of this interpretation, reliance was placed on **Law Society of Kenya v Attorney General & 3 others [2016] eKLR**, where the court clarified that the statutory cap limits what the insurer pays as compensation but does not preclude higher cover or additional obligations, depending on the policy and legal framework.

12. The Plaintiff further anchored her argument on Section 10(1) of the Act, which expressly obligates an insurer to satisfy a judgment, including “any amount payable in respect of costs and any sum payable in respect of interest.” To reinforce this statutory interpretation, the Plaintiff

heavily relied on the decision in **Kiamuko & another (Suing as Administrators of the Estate of the Late Evans Kyalo Maundu - Deceased) v ICEA Lion General Insurance Co. Limited (Civil Suit 26 of 2018) [2022] KEHC 11682 (KLR)**, where the Court held that costs and interest are payable in addition to the statutory limit principal sum and that a defence denying such payment is frivolous and an abuse of the court process.

13. Also cited was the case of **Rhofus Furaha Maisha v Directline Assurance Co. Limited (Malindi Civil Appeal No. 15 of 2022) [2023] KEHC 25339 (KLR)**, where the Court emphasized that costs are not included in the Kes. 3,000,000/- statutory limit and must follow the event, being compensation for litigation expenses. The Plaintiff also cited **Francisca Akoth Otiep v Obonyo (Miscellaneous Application E088 of 2021) [2023] KEHC 1750 (KLR)** for the proposition that an insurer who participates in proceedings by instructing counsel cannot later evade liability to satisfy the judgment.

14. The submissions further emphasize that the Defendant's conduct in paying the statutory sum while simultaneously instructing advocates to oppose the bill of costs as demonstrative of acknowledgement that costs and interest fall outside the statutory cap. In this regard, the Plaintiff

relied on **Bernard Mutisya Wambua v Kenya Orient Insurance Company Ltd [2020] eKLR**, where the court held that an insurer who delays payment of the statutory sum cannot escape liability for interest and costs arising from such delay. And the case of **Peter Gichihi Njuguna v Jubilee Insurance Co. Ltd [2016] eKLR**, where the court held that an insurer who forces a claimant to institute proceedings to recover sums it ought to have paid must bear the resultant costs, reiterating the principle in Section 27 of the Civil Procedure Act that costs follow the event.

15. In conclusion, the Plaintiff submitted that the Defendant has failed to demonstrate any valid basis for denying payment of costs and interest and that the defence was frivolous, vexatious, and intended to delay justice. The court was urged to allow the motion.
16. On their part, the Defendant filed submissions dated 14th August, 2025. Contending that the motion is misconceived and did not meet the legal threshold for striking out pleadings, the Defendant asserted that the Plaintiff had failed to demonstrate that the defence was frivolous, vexatious, or an abuse of the court process as contemplated under Order 2 Rule 15 of the Civil Procedure Rules.

17. The Defendant cited **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR** for the proposition that the power to strike out pleadings is draconian and should only be exercised in the clearest of cases, and that no suit ought to be summarily dismissed unless it is so hopeless that it plainly discloses no reasonable cause of action and is therefore irredeemable. The Defendant argued that its defence raises substantive and triable issues which can only be determined through a full hearing through viva voce evidence, and therefore ought not to be struck out at an interlocutory stage.
18. And reiterating that it has fully discharged its statutory obligation by paying the sum of Kes. 3,000,000/-, being the maximum liability under the Act, the Defendant submitted that the defence clearly avers that an insurer is not legally obligated to satisfy any decretal sum beyond this statutory cap, and that any excess amount is recoverable from the insured and not the insurer.
19. In reinforcing the foregoing argument, the Defendant relied on the Court of Appeal decision in **Kirikuu v Kenya Orient Insurance Company Limited (Civil Appeal E189 of 2022) [2024] KECA 8 (KLR)**, where it was held that the insurer's liability is strictly limited to

Kes. 3,000,000/- and any excess sum is recoverable from the insured. The Defendant highlighted the court's pronouncement that upon an insurer paying the statutory maximum, it had met its legal obligation and bears no further liability to the claimant.

20. In disputing that its defence contains any admission of liability beyond the statutory limit, the Defendant asserted that the said defence raises key triable issues, including whether the insurer is liable beyond the statutory limit, whether it has satisfied its statutory obligations, and whether the Plaintiff's claim is merited. It contends that these issues cannot be resolved summarily and require a full trial. In this regard, reliance was placed on **Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR**, where the Court of Appeal reiterated that striking out pleadings is a remedy of last resort and should only be exercised where the case is clear and unarguable.

21. The Defendant concludes by arguing that it would be unjust to deny it the opportunity ventilate its defence which raises bona fide triable issues deserving judicial determination. The court was therefore urged to dismiss the Plaintiff's motion with costs and to allow the matter to proceed to full hearing.

Analysis and Determination

22. The Court has considered the parties' rival affidavit material and submissions in respect of the motion which is primarily expressed to be brought under the provisions of Order 2 Rule 15 of the CPR. Two key issues arise for determination, namely, whether the Defendant's statement of defence discloses any triable issues or is a sham hence liable to be struck out; and whether the Plaintiff is entitled to judgment on admission. The motion is premised on grounds found in Order 2 Rule 15 (1) of the CPR which relate to applications for striking out of pleadings as sought in the first prayer in the motion.
23. However, the second prayer seeks judgment on admission which is governed by a different set of principles and would properly be brought pursuant to the provisions of Order 13 Rule 2 of the CPR which has not been invoked here. Nevertheless, from material canvassed by the parties, the motion was treated as one based on both Order 2 Rule 15(1) and Order 13 Rule 2 of the CPR.
24. The former Rule provides that; -

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed dismissed or judgment to be entered accordingly, as the case may be.

or

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.”

25. As rightly submitted by the Defendant, the principles governing applications for striking out of pleadings were spelt out by **Madan JA** (as he then was) in **D.T. Dobie & Company (Kenya) Limited** (supra). The Court stated therein that: -

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

26. These principles have held sway in subsequent years and have been applied consistently in our jurisdiction. In **Kivanga Estates v National Bank of Kenya Limited [2017] eKLR**, for instance, the Court of Appeal echoing the dicta in **D.T Dobie (supra) stated; -**

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a

guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious".

See also: - **Crescent Construction Co. Ltd v. Delphis Bank Ltd [2007] eKLR**

27. There is no dispute that the present suit emanates from the primary suit in which the Plaintiff was awarded damages, a portion of which has been settled by the Defendant pursuant to the statutory cap in the Act. The court has considered the Plaintiff's present claim and the defence statement on record. What the Plaintiff seeks by her instant suit is a declaration that the Defendant is liable, in addition, to settle taxed costs and interest in respect of the primary suit.

28. On the other hand, the defence is premised on the single legal position that the Defendant's liability as an insurer is capped at Kes. 3,000,000/- and having already discharged its obligation, is not liable to make any further payments to the Plaintiff by way of costs and interest. As pleaded, the position is not vague, evasive, or unintelligible — it is clear, specific, and anchored in statute. And raises the twin key triable issues whether the statutory limit under the Act includes costs and interest and whether the Defendant has fully satisfied its legal obligation.

29. These are not frivolous or fanciful issues. They are questions of law and also fact requiring judicial interpretation, and application of Sections

5 and 10 of the Act. A pleading that raises even a single bona fide triable issue cannot qualify as hopeless or irredeemable and ought to be allowed to proceed to trial. In the court's view therefore the defence raises triable issues and cannot be termed a sham, frivolous, or vexatious or otherwise an abuse of the process of the court. The court therefore finds that the defence statement discloses bonafide triable issues and ought to be allowed to proceed.

30. In **Yaya Towers Limited v Trade Bank Limited (In Liquidation)**

[2000] eKLR the Court of Appeal expressed itself in the following manner:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the 1st Defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial....It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in

exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

31. With regard to the second question whether the Plaintiff is entitled to judgment on admission, Order 13 Rule 2 of the CPR is in the following terms:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

32. For judgment to be entered against a party on admission, the admission must be clear, unequivocal, and unconditional. As stated by **Madan JA** (as he then was) regarding entry of judgment on admission under Order XII rule 6 CPR, now Order 13 Rule 2 CPR in **Choitram & Another V Nazari (1984) KECA 47 (KLR)**:

18. To entitle a party to judgment admissions must be clear. Judgment should be given under order XII rule 6 only in a very plain case.

19. In this case I am asked to analyse the pleadings, the correspondence and other documents and apply the relevant law to determine whether or not admissions are disclosed entitling the plaintiffs to specific performance and damages.

20. It is very far from being a plain case. Order XII rule 6 was not intended to be used in this way. The application goes far beyond what is envisaged. It is dismissed with costs to the respondent." Order XII rule 6 reads: - 6. ..."

21. For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a

definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter.”

33. The learned Judge of Appeal concluded by stating that:

“In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court’s discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.

22. The best exposition of rule 6 which I have met so far comes from Roskill LJ in a case in which the order ought to have been refused, i.e. in *Technistudy v Kelland* [1976] 1 WLR 1042 at page 1046 where he said: *Order should only be made under the rule (English equivalent) if it is plain that there are either clear express, or clear implied, admissions. I can see no clear admissions or clear implied admissions”.*

See also *Odera t/a Odera & Associates vs Machira t/a Machira & Co. Advocates* (2013) KECA 208(KLR).

34. It is the Plaintiff's contention that the defence amounts to an admission of liability because the Defendant acknowledges the judgment in the primary suit and subsequent payment of Kes. 3,000,000/- towards the principal sum awarded to the Plaintiff. As pleaded, the Plaintiff's claim is not in respect of the principal sum awarded in the primary suit, but rather for taxed costs therein and interest on the principal sum allegedly paid 65 days after judgment, as well as further interest upon judgment herein until whatever adjudged sums are paid in full.

35. From a plain reading of the averments in the defence statement it is evident that whereas the Defendant indirectly admits the payment of the sum of Kes. 3,000,000/- towards the principal sum in the primary suit, it disputes any further liability, including liability for costs and interest, citing the statutory limit under the Act which obligates the insurer to pay a maximum sum of Kes. 3,000,000/- in respect of each claim.

36. The Plaintiff's substantive averments under the heading entitled "***Factual Allegations***" (sic) at paragraphs 4-9 of the plaint are expressly traversed at paragraphs 4,5, and 6 of the defence statement. This pleading cannot in any way be construed to be an admission of the

Plaintiff's claim for costs and interest arising in the primary suit. This is not a clear or plain case for the invocation of Order 13 Rule 2 of the CPR, there being no clear express, or clear implied admissions in the defence. Conversely, the defence raises the triable question that goes to the heart of the Plaintiff's claim, namely, whether the Defendant is in the circumstances of the case obligated under the Act to make additional payments to the Plaintiff by way of costs and interest as awarded in the primary suit. In the circumstances the prayer for judgment on admission cannot lie.

37. In the result, the motion dated 13th May 2025 must fail and is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 14TH DAY OF MAY 2026



C. MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Mwangi h/b for Mr. Banda

For the Defendant: Mr. Kiplagat

C/A: Lepatei